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No. 91-1160

In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE,

Petitioner,

vs.

THOMAS EUGENE CREECH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech and David Jensen were inmates in the maximum security unit at the Idaho Correctional Facility. At 2:00 that afternoon, Jensen attacked Mr. Creech by swinging a sock full of batteries at him. (RT 1984 at 15-20, 26-27.)[1] Mr. Creech defended himself, punching Jensen and taking the batteries away from him. Fifteen minutes later, Jensen once again attacked Mr. Creech, this time slashing him with a razor blade attached to a toothbrush. He slashed Mr. Creech in the stomach, the arms and the face. Mr. Creech swung the sock of batteries at Jensen, hitting him in the head until he collapsed and died. (RT 1984 at 26-33.) Before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. (RT 1984 at 34; ER 156-157.)

On June 8, 1981, Mr. Creech was charged with first degree murder. Although he initially pled not guilty, he later changed his plea to guilty and asked to be sentenced to death. (RT 1981 at 35.) Over his counsel's objection, the trial court allowed Mr. Creech to plead guilty. (RT 1981 at 39-40.) After a January 11, 1982 sentencing hearing the state trial court issued findings of fact. The trial court explicitly found that Jensen had attacked Mr. Creech

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[1] "RT 1981" refers to the Reporter's Transcript covering the August 1981 change of plea hearing. "RT 1982" refers to the Reporter's Transcript covering the January 1982 sentencing hearing. "RT 1984" refers to the Reporter's Transcript covering Mr. Creech's February 1984 motion to withdraw the guilty plea. "ER" refers to the Excerpt of Record filed in this case.

without provocation and that Mr. Creech was initially justified in defending himself:

> "[T]he defendant did not instigate the fight with the victim, but the victim, without provocation, attacked him. [Defendant] was initially justified in protecting himself." (ER 46.)

The state trial court also found, however, that Mr. Creech's actions went "well beyond self-defense" and evidenced an "excessive violent rage." (ER 46.) The trial court imposed a death sentence. (ER 45-50.) In violation of state law, Mr. Creech was not present when the trial court imposed this sentence. Idaho Code § 19-2503.

The case was automatically appealed to the Idaho Supreme Court. On February 25, 1983, after Mr. Creech had been on death row for over one year, the Idaho Supreme Court vacated the death sentence and remanded the case for resentencing because Mr. Creech had not been present at the original sentencing. (ER 51-52.) The case was remanded for the trial court to select and impose a "just and appropriate" sentence. (ER 52.)

On March 15, 1983, the trial court ordered that Mr. Creech and his counsel appear two days later for resentencing. (ER 122.) The trial court denied Mr. Creech's motion for a continuance. (RT 1983 at 22-23.)

At the March 17 resentencing, and in an effort to persuade the court to impose a life sentence, Mr. Creech sought to present a significant amount of mitigating evidence, including testimony from prison guards about his good behavior in prison. Although it had been over 14 months since the original sentencing hearing, the trial

court refused to allow Mr. Creech to present *any* mitigating evidence. Instead, the court simply reread its January 25, 1983 death sentence.

After being denied relief in the state courts, Mr. Creech filed a habeas corpus petition in federal district court. The federal district court denied the petition. Mr. Creech appealed to the Ninth Circuit.

On October 16, 1991, a panel of the Ninth Circuit consisting of Judges Hall, Wiggins and Beezer affirmed the district court's denial in part, reversed it in part and remanded the case for a sentencing hearing at which the trial court would not completely preclude Mr. Creech from presenting mitigating evidence. *Creech v. Arave*, 947 F.2d 873, 881-882 (9th Cir. 1991). Because a remand for resentencing was required, and because the record suggested the trial court relied on two aggravating circumstances without making certain required factual findings, the panel went on to require such factual findings at the resentencing. *Id.* at 882. Finally, the court held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague. *Id.* at 882-885.

Petitioner's Petition for Rehearing and Suggestion for rehearing *En Banc* was rejected, with three of the twenty-six active Circuit Judges dissenting. Petitioner then applied for a stay of mandate from this Court. Justice O'Connor denied this application on December 10, 1991. Petitioner now seeks a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT CORRECTLY HELD THAT IDAHO'S "UTTER DISREGARD" AGGRAVATING FACTOR FAILED TO PROVIDE THE TYPE OF GUIDANCE WHICH WOULD PROPERLY CHANNEL THE SENTENCER'S DISCRETION IN IMPOSING DEATH.

Idaho Code § 19-2515(g)(6) provides that anyone convicted of murder is eligible for the death penalty if he exhibits "utter disregard for human life." In *State v. Osborn*, 102 Idaho 405, 632 P.2d 187 (1981), the Idaho Supreme Court conceded that this phrase was unconstitutionally vague, but attempted to legitimize it by defining it as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 631 P.2d at 200-201. Presumably armed with this "limiting" definition, the state trial court sentenced Mr. Creech to die, in part, by relying on the utter disregard aggravating circumstance.

Writing for the panel, and relying entirely on decisions from this Court, Judge Hall held that the definition set forth in *Osborn* was unconstitutionally vague because it failed to narrow the sentencer's discretion as to how it was to apply the utter disregard aggravating factor. *Creech v. Arave, supra*, 947 F.2d at 882-885. Petitioner contends that certiorari is appropriate in this case and that the panel should have acceded to the definition fashioned by the Idaho Supreme Court.

Certiorari is not appropriate in this case for two reasons. First, Judge Hall's decision on this issue is of

limited significance. Of the 37 states with capital punishment, Idaho is the only state with an "utter disregard" aggravating factor. Moreover, Idaho has a separate aggravating factor, unaffected by the decision in this case, which allows imposition of a death sentence for murders that are "heinous, atrocious or cruel, manifesting exceptional depravity."

Second, certiorari is not appropriate in this case because the decision represents a simple and correct application of principles articulated in a long line of decisions from this Court. Judge Hall's application of these principles did not create a split in the courts nor any new law. Moreover, on the facts of this case, application of the *Osborn* construction is totally unsupported by the record.

As the panel noted, this Court has repeatedly held an aggravating circumstance must furnish the sentencer with " 'clear and objective standards' that provide 'specific and detailed guidance,' and 'that make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). *Accord Maynard v. Cartwright*, 486 U.S. 356, 362-364 (1988); *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3099 (1990). The purpose of requiring specific and detailed guidance is to "channel and limit the sentencer's discretion." *Maynard v. Cartwright, supra*, 486 U.S. at 362.

Based on these precise principles, this Court has repeatedly required that a state court may save a facially invalid aggravating circumstance construction if the court narrows and defines the aggravating circumstance by some reference to objective and clear guidelines. *See Shell*

v. Mississippi, ___ U.S. ___, 111 S.Ct. 313 (1990) (invalidating Mississippi's "especially heinous and atrocious" aggravating circumstance when not meaningfully narrowed by reference to some objective or verifiable circumstances); *Walton v. Arizona*, ___ U.S. ___, 110 S.Ct. 3047, 3057-3058 (1990) (upholding Arizona court's narrowing of facially invalid "especially heinous, cruel or depraved" aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as infliction of mental anguish or physical abuse, relishing the murder or showing indifference to the victim's suffering).[2]

The circuits have followed this Court's instructions by holding unconstitutional attempts by state courts to define a facially vague aggravating circumstance by reference to an equally vague definition that is without clear and objective guidance to the sentencing court. *See, e.g., Moore v. Clarke*, 904 F.2d 1226, 1229-1233 (8th Cir. 1990) (invalidating Nebraska's "especially heinous, atrocious or cruel" aggravating circumstance when not meaningfully

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[2] *See also Proffitt v. Florida*, 428 U.S. 242, 255-256 (1976) (upholding Florida court's narrowing of "heinous, atrocious or cruel" aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as torture); *Godfrey v. Georgia, supra*, 446 U.S. at 430-431 (upholding Georgia court's narrowing of aggravating circumstance when meaningfully narrowed by reference to objective or verifiable circumstances such as torture, aggravated battery or serious physical abuse). *See Maynard v. Cartwright, supra*, 486 U.S. at 364-365 (in rejecting Oklahoma's facially invalid "especially heinous, atrocious or cruel," Court expresses approval of a limiting construction requiring "some kind of torture or physical abuse.").

narrowed by reference to some objective or verifiable circumstances); *Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) (invalidating Oklahoma's "heinous, atrocious and cruel" aggravating factor when not meaningfully narrowed by reference to some objective or verifiable circumstances), aff'd, 486 U.S. 356 (1988).

State courts have also long followed this Court's guidance, properly narrowing facially vague aggravating factors by reference to some objective circumstances. *See, e.g., State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982), *cert. denied* 459 U.S. 988 (1982) (narrowing "ruthlessness" aggravating circumstance to require aggravated battery or torture); *State v. Sonier*, 402 So.2d 650, 659 (La. 1981), *cert. denied* 463 U.S. 1229 (1983) (narrowing "heinous, atrocious and cruel" aggravating circumstance to require serious physical abuse); *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569 (1979) (narrowing "heinous, atrocious and cruel" aggravating circumstance to require torture).

Judge Hall followed these authorities precisely. The first part of *Osborn*'s limiting definition – requiring "the highest, utmost, callous disregard for human life" – is insufficient because it simply restates the language of the statute. This restatement provides no more guidance than the language of the statute itself, and gives the sentencer unbridled discretion to impose a death sentence. "[V]ague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard, supra*, 822 F.2d at 1489.

Nor does the second part of the *Osborn* reformulation – the terms "cold-blooded" or "pitiless" – add the

required clarity to *Osborn*'s construction. As the panel correctly held, these phrases fail to provide any substantive guidance to the sentencer as to the circumstances under which the defendant has exhibited "utter disregard for human life" and those under which he has not. Is the sentencer's discretion meaningfully narrowed when it is allowed to sentence someone to die for being "cold-blooded"?[3]

The term "pitiless" is equally vague. What does "pitiless" mean, and by what objective criteria can a sentencer distinguish a pitiless killing from one that is with pity? As one state supreme court has noted in this exact context, a "pitiless first degree murder assumes the existence of such murder performed with . . . pity. We cannot fathom what it could be." *People v. Superior Court (Engert)*, 31 Cal.3d 797, 803 (1982).

Indeed, on this record, the trial court's finding of "utter disregard" – if intended to mean either "cold blooded" or "pitiless" – is inconceivable.[4] The state trial court found that without any provocation, Jensen instigated the fight with Mr. Creech, Mr. Creech was justified in protecting himself, and that Mr. Creech was acting in

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[3] Although the term "cold-blooded" is itself facially vague, a state may constitutionally narrow such a term by reference to objective criteria. *See Cannady v. State*, 427 So.2d 723 (Fla. 1983) (limiting "cold, calculated and premeditated" aggravating factor to executions or contract murder).

[4] The trial court never stated it was applying the *Osborn* formulation. This may explain why there are no findings that, in fact, the killing was either "cold-blooded" or "pitiless." Nor did the Idaho Supreme Court make any such findings. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

an "excessive violent rage." Jensen attacked Mr. Creech with a sock full of batteries and, moments later, with a razor blade attached to a toothbrush. Jensen cut Mr. Creech's arms, face and stomach. Nevertheless, before being taken to the hospital in a wheelchair, and immediately after the fight, Mr. Creech referred medical aid to Jensen. How can a killing be either "cold blooded" or "pitiless" when it is the result of an excessive violent rage, caused by an unprovoked, deadly attack by the victim, immediately after which the defendant refers medical aid to the victim? It cannot.

Alternatively, respondent argues that the Idaho courts have adequately narrowed the "utter disregard" aggravating circumstance by holding that it does *not* apply in cases where other aggravating circumstances apply. Similarly, but without citation to any authority, respondent argues that the utter disregard circumstance has been properly narrowed because it does *not* apply to killings that are "the product of significant emotional distress or provocation."

Neither of these "negative" definitions solve the fundamental vagueness problem at issue in this case. A facially invalid aggravating factor is rendered constitutional by a limiting definition explaining when the factor *does* apply. Neither precedent, policy nor common sense support respondent's notion that a state can constitutionally define an aggravating factor by explaining when it does *not* apply.

In short, the panel simply applied principles long articulated by this Court to a meaningless definition manufactured by the Idaho Supreme Court. There is no

reason to review the panel's proper application of these principles.

II.

THE CIRCUIT CORRECTLY HELD THAT THE STATE TRIAL COURT'S FAILURE TO APPLY THE BURDEN OF PROOF REQUIRED UNDER STATE LAW BEFORE AGGRAVATING CIRCUMSTANCES MAY BE FOUND TO EXIST RENDERED RELIANCE ON THESE AGGRAVATING FACTORS CONSTITUTIONALLY IMPROPER.

Idaho Code §§ 18-4003(c) and (e) respectively provide that any murder committed by a person who is under sentence for murder, or any murder of an inmate in a prison, constitutes first degree murder. Idaho law is equally clear that such crimes may constitute statutory aggravating circumstances which authorize imposition of a death sentence *only* when accompanied by a specific intent to kill proven beyond a reasonable doubt. Idaho Code §§ 19-2515(g)(1), 19-2515(g)(7).

In imposing a death sentence here, the trial court made no finding of intent and inexplicably purported to rely on Idaho Code §§ 18-4003(c) and (e) as statutory aggravating circumstances. At no point has petitioner ever disputed that if the state trial court did not make the requisite finding of intent, reliance on the aggravating circumstances set forth in § 19-2515(g)(7) was constitutionally improper. *See Clark v. Louisiana State Penitentiary*, 694 F.2d 75, *opinion on rehearing*, 697 F.2d 699 (5th Cir. 1983). Instead, petitioner simply argues that on the particular facts of this case, Judge Hall erred in concluding that

the state trial court failed to make this intent finding beyond a reasonable doubt.

In three separate respects, however, the record shows that no such finding was ever made. First, the state trial court failed to indicate that it had found an intent to kill beyond a reasonable doubt. Its written findings were divided into three sections: (1) aggravating facts found beyond a reasonable doubt; (2) aggravating facts *not* found beyond a reasonable doubt; and (3) mitigating facts. The *only* section of findings which the court purported to make beyond a reasonable doubt was *devoid of any finding that Mr. Creech specifically intended to kill Jensen.* Similarly absent from this section of the findings is any reference to § 19-2515(g)(7).

Second, the state trial court made factual findings about Mr. Creech's state of mind which were inconsistent with an intent to kill. The court explicitly found that Jensen instigated the fight, and that Mr. Creech's actions "evidenced an excessive violent rage," suggesting that it was not a specific-intent crime at all, but one borne of emotional response and passion.

Third, the Idaho Supreme Court itself found that the trial court had *not* made the requisite intent finding necessary for a statutory aggravating circumstance under § 19-2515(g)(7). The only reference to intent in the state trial court's findings was its observation that the murder "*appears* to have been an intentional, calculated act." (Emphasis added.) The Idaho Supreme Court has acknowledged, however, that given its placement in the section of the trial court's findings that did not purport to be made beyond a reasonable doubt, this finding was

unlikely to have been made beyond a reasonable doubt. *See State v. Creech, supra,* 670 P.2d at 470.[5]

Petitioner argues for the first time in its Petition for Writ of Certiorari that Judge Hall was obligated to ignore the state supreme court's finding, "presume" that the trial court *implicitly* found beyond a reasonable doubt that Mr. Creech had the specific intent to kill and accord this implicit factual finding a presumption of correctness under 28 U.S.C. § 2254(d). Certiorari is inappropriate on this issue for three reasons.

First, since this case must be remanded for resentencing due to the trial court's inexplicable refusal to allow presentation of *any* mitigating evidence at Mr. Creech's capital sentencing hearing, the panel's caution that the state judge not apply § 19-2515(g)(7) at resentencing "without making a finding of intent" was a prudent use of judicial resources.[6] In light of the need for a new sentencing hearing, it would have been utterly senseless

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[5] It was for this reason that the Idaho Supreme Court construed this finding as a *non*-statutory aggravating circumstance. *State v. Creech, supra,* 670 P.2d at 470. Had the intent finding been made beyond a reasonable doubt, of course, this would have constituted a statutory aggravating circumstance under § 19-2515(g)(7).

[6] Contrary to petitioner's repeated observations, Judge Hall did *not* require the trial court to make the finding in "a particular format." Indeed, the opinion does not even require the finding to be written. In light of the ambiguous record, Judge Hall's opinion simply and properly advised the trial court that before it could once again rely on § 19-2515(g)(7), it had to make the requisite finding of intent.

to have the state trial court create the same type of ambiguous record, leading to further litigation.

Second, petitioner's argument must be rejected because there were no "implicit" factual findings to which the presumption of correctness could attach. Petitioner correctly notes that the presumption of correctness created by 28 U.S.C. 2254(d) applies to both express and implied factual findings. *Townsend v. Sain,* 372 U.S. 293, 314 (1963). Where no express findings have been made, the federal court may "reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia." *Id.* Where no express findings have been made, and where the trier of fact is a judge, it may be appropriate to reconstruct the judge's findings by applying the rule that "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona, supra,* 110 S.Ct. at 3057.

Contrary to petitioner's suggestion, however, the presumption that trial judges know and apply the law is not irrebuttable. To the contrary, where the state trial court does not articulate its findings, but where the record affirmatively contains indicia of unreliability concerning these factfindings, this presumption may not be employed to infer an implicit factual finding on the state trial court's part. *Townsend v. Sain, supra,* 372 U.S. at 315 and n.10; *Green v. Zant,* 715 F.2d 551, 557-559 (11th Cir. 1983), *cert. denied* 469 U.S. 1143 (1985). *See Clemons v. Mississippi,* ___ U.S. ___, 110 S.Ct. 1441, 1449-1450 (1990) (conflicting indicia in state supreme court opinion regarding the standard of prejudice applied requires a remand); *Eddings v. Oklahoma,* 455 U.S. 104, 109, n.4

(1982). Moreover, as recognized by the Eleventh Circuit in determining whether this general rule justified implied factual findings, "the question of whether factfindings were actually made by the state court is a threshold inquiry. This inquiry must occur prior to any discussion of the presumption of correctness given to factual determinations made by state courts . . . . " *Green v. Zant, supra,* 715 F.2d at 557.

Thus, while it may be appropriate in some circumstances to imply factual findings based on the rule that trial judges know and apply the law, this rule cannot apply when there are affirmative indicia of unreliability concerning the factfindings. In such a situation, there are no implied factual findings to which the presumption of correctness set forth in 28 U.S.C. § 2254(d) can apply.

This is precisely the approach adopted by the Circuit in this case.[7] The trial court did not merely fail to articulate the standard (i.e., beyond a reasonable doubt) by which it was to determine Mr. Creech's state of mind or "specific intent." As observed by the Idaho Supreme Court and Judge Hall, the findings affirmatively reflect, by their very structure, that the trial court's "intent" finding was made under a standard *other* than beyond a reasonable doubt. Moreover, this limited, defective intent finding is rendered even more unreliable by the court's corresponding holding that Jensen's death was the result of Jensen's "instigation" and Creech's "excessive . . . rage." In refusing to presume that the trial court made

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[7] Significantly, Judge Hall's opinion makes clear that she was aware of the presumption of correctness. 947 F.2d at 879, n.5.

factual findings which the record affirmatively suggests the trial court did *not* make, Judge Hall committed no error.

Finally, petitioner's newly-asserted reliance on a presumption of correctness also ignores the established principle that appellate findings are also entitled to a presumption of correctness. *Parker v. Dugger,* ___ U.S. ___, 111 S.Ct. 731, 739 (1991). The panel had no power to substitute its view of the facts for the apparent view of the Idaho Supreme Court that the intent finding had not been made beyond a reasonable doubt. *Wainwright v. Goode,* 464 U.S. 78, 85 (1983).

Respondent does not explain how the presumption of correctness can have meaningful application where the record contains inconsistent findings. Should the panel in this case have presumed as correct the Idaho Supreme Court's finding that the trial court did *not* find intent beyond a reasonable doubt? Or should it have ignored this finding and presumed correct the trial court's findings that Jensen's death resulted from "Jensen's instigation" and Mr. Creech's "excessive rage" (thereby indicating that specific intent was wholly lacking)? Or should the panel have presumed correct the trial court's observation that the killing "appeared" to be an "intentional" act? Both of the latter two findings were given equal weight by the trial court, and neither finding was made "beyond a reasonable doubt": in all events, the trial court could not have made *both* findings beyond a reasonable doubt. Under these circumstances, there can be no presumption of correctness, since it is entirely unclear

what factual finding was made or should be presumed correct.[8]

III.

THE CIRCUIT CORRECTLY HELD THAT BECAUSE THE STATE TRIAL JUDGE WAS CHOOSING BETWEEN LIFE AND DEATH AT THE MARCH 17, 1983 SENTENCING HEARING, THE TRIAL JUDGE'S REFUSAL TO ADMIT ANY MITIGATING EVIDENCE VIOLATED THE EIGHTH AMENDMENT.

In its February 25, 1983 order requiring resentencing, the Idaho Supreme Court made clear that at the resentencing, the trial judge could impose either a life or death sentence:

> "[T]he sentence of death imposed upon the defendant in the absence of defendant and his counsel . . . is vacated and the cause is remanded . . . [for imposition of] such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event that said judge shall impose a sentence of death, a warrant therefor shall issue in accord with I.C. section 19-2795 . . . . " (ER 51-52.)

[8] Petitioner has never raised the presumption of correctness issue, either in the federal district court or in the Court of Appeals. Where issues are not raised in the Court of Appeals, this Court will not consider them absent exceptional circumstances. *See, e.g., Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958). *See also Burden v. Zant*, ___ U.S. ___, 111 S.Ct. 862, 865 (1991) (suggesting that reliance on a presumption of correctness may be waived by failure to properly raise the issue in the Court of Appeals). This case does not contain any exceptional circumstances that would justify petitioner's tactical decision to sandbag the panel by holding this argument in reserve in the event of an unfavorable ruling.

In *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986) the Idaho Supreme Court held that as a matter of state law, a remand order for resentencing in the defendant's presence empowered the trial court to choose between life and death. *Sivak* involved facts identical to this case: defendant was convicted of murder, sentenced to death in his absence, and the Idaho Supreme Court issued an order vacating the death sentence which was *word-for-word* identical to the remand order in this case. On appeal from the subsequent death sentence, the Idaho Supreme Court explicitly held that its remand order gave the trial judge authority to choose between life and death:

> "Initially, we must point out that our intent in vacating Sivak's sentence in our order of March 24, 1983, was not merely to require that the defendant and his counsel be physically present while the court recited its findings and conclusions made over a year before. Inherent in the order that the district judge 'impose such sentence upon the defendant Lacey M. Sivak as may appear to be just and appropriate,' was the obligation of the judge not to ignore any relevant motions or arguments made by the defendant or his counsel which would affect the justness and appropriateness of the sentence." 731 P.2d at 195.

Pursuant to Idaho state law, the Idaho Supreme Court's *identical* remand order in this case gave the trial court authority to decide between sentencing Mr. Creech to live or sentencing him to die. Under this circumstance,

the trial court's complete refusal to allow Mr. Creech to present *any* mitigating evidence was a plain violation of the Eighth Amendment.

When a state provides for a sentencing hearing at which the sentencer chooses between life and death, the Eighth Amendment does not allow the state to preclude the defendant from presenting relevant mitigating evidence at this hearing. *Lockett v. Ohio*, 438 U.S. 586 (1978). Such evidence may include, for example, mitigating evidence of a defendant's good behavior in prison. *Skipper v. South Carolina*, 476 U.S. 1 (1986).

Every court to ever face this issue has held that when state law provides for a resentencing at which the sentencer may choose between life and death, the Eighth Amendment requires that the defendant be allowed to present *current* evidence in mitigation. *See, e.g., Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (ordering resentencing at which "any and all evidence in mitigation" could be introduced); *State v. Tison*, 160 Ariz. 501, 774 P.2d 805 (1989) (Arizona Supreme Court holds that at a capital resentencing hearing the defendant was entitled to present current evidence in mitigation); *Pickens v. State*, 730 S.W.2d 230, 232-233 (Ark. 1987) (at a resentencing hearing the trial court refused to allow defendant to present current evidence in mitigation: held, this refusal violated the Eighth Amendment); *Sivak v. State, supra*, 731 P.2d at 197-198 (same); *State v. Watson*, 129 Ariz. 60, 628

P.2d 943 (1981) (same).[9] In this case, Judge Hall correctly applied these well established principles and held that the trial court's refusal to admit any mitigating evidence at the March 17, 1983 resentencing violated the Eighth Amendment principles recognized in *Lockett* and *Skipper*. *Creech v. Arave, supra*, 947 F.2d at 881-882.

Contrary to the misleading suggestion in petitioner's Petition for Writ of Certiorari, neither the Idaho Supreme Court nor the Circuit Court of Appeals held that the March 17, 1983 sentencing hearing was somehow required by the Eighth Amendment. The Idaho Supreme Court held that state law gave the trial court discretion to choose between life and death. In turn, Judge Hall simply agreed with every other court to ever face this issue, holding that where *state law itself* provides for a sentencing hearing at which the sentencer may choose between life and death, the Eighth Amendment requires that the defendant be allowed to present evidence and argue for life. *Compare Parker v. Dugger, supra*, 111 S.Ct. 731 (although neither appellate reweighing of aggravating circumstances nor harmless error analysis are constitutionally required, if either process is performed, it must comport with the Eighth Amendment); *Clemons v. Mississippi, supra*, 110 S.Ct. 1441 (same); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (although procedure allowing a judge to override a jury's sentencing recommendation in a capital

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[9] In *Skipper v. South Carolina, supra*, this Court noted that if the state chose to seek the death penalty at a resentencing, defendant was entitled to a hearing at which he could "present any and all relevant mitigating evidence that is available." 476 U.S. at 4.

case is not constitutionally compelled, if such a procedure is authorized, it must comport with the Eighth Amendment). There is utterly no reason to disturb the Circuit's straightforward application of these Eighth Amendment principles.

CONCLUSION

The Circuit's decision that Idaho had failed to adequately limit the application of its unique "utter disregard" aggravating circumstance follows inexorably from principles of law long established by this Court. Similarly, the panel's two alternative grounds for its partial reversal faithfully applied this Court's precedents to the unique facts of this case, facts which are unlikely to recur in Idaho or elsewhere. There is nothing in the panel's decision which warrants this Court's review.

Respectfully submitted,

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